FILE COPY

SEP 10

No. 601

In the Supreme Court of the United States

OCTOBER TERM, 1941

M. HAMPTON MAGRUDER, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

WASHINGTON, BALTIMORE, AND ANNAPOLIS REALTY CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes and regulations involved	2
Statement	4
Specification of errors to be urged	6
Reasons for granting the writ	7
Conclusion	10

CITATIONS

Cases:	
Edgar Estates Corp. v. *United States*, 65 C. Cls. 415	9, 10
Hercules Mining Co. v. *United States*, No. 522, present Term	7
Johnson's Estate v. *United States*, 37 F. Supp. 617	10
Statutes:	
Revenue Act of 1916, 39 Stat. 756, Sec. 40	8
Revenue Act of 1935, 49 Stat. 1014, Sec. 105	2
Revenue Act of 1936, 49 Stat. 1648, Sec. 401	2
Miscellaneous:	
Internal Revenue Code, Sec. 1200 (U. S. C., Supp. V, Title 26, Sec. 1200)	2
	8
Treasury Regulations 50 (1919 Edition), Art. 18	8
Treasury Regulations 50 (1920 Edition), Art. 11	8
Treasury Regulations 64 (1922 Edition), Art. 12	8
Treasury Regulations 64 (1924 Edition), Art. 12	8
Treasury Regulations 64 (1933 Edition), Art. 22	8
Treasury Regulations 64 (1934 Edition), Art. 33	8
Treasury Regulations 64 (1936 Edition):	
Art. 41	3
Art. 42	3
Art. 43	3, 7, 8
Treasury Regulations 64 (1938 Edition), Art. 43	3, 8

412525—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. —

M. HAMPTON MAGRUDER, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

WASHINGTON, BALTIMORE, AND ANNAPOLIS REALTY CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Acting Solicitor General, on behalf of M. Hampton Magruder, Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered in the above-entitled cause on June 10, 1941, affirming the decision of the District Court of the United States for the District of Maryland.

OPINIONS BELOW

The opinion of the District Court (R. 22–29) [1] is reported at 35 F. Supp. 340. The opinion of the

[1] The printed record in this case will consist of the appendix to the appellant's brief in the court below plus the proceedings in the court below. At the time of the writing of this petition the printed record has not yet been received from

United States Circuit Court of Appeals for the Fourth Circuit (R. 14–20) is reported in 120 F. (2d) 441.

JURISDICTION

The judgment below was entered on June 10, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer corporation was organized for the purpose of and engaged in liquidating the assets of another corporation. A capital-stock tax is imposed upon corporations with respect to "carrying on or doing business." Applicable Treasury Regulations provide that "doing business" includes such liquidation activities. The question presented is whether the regulations have so far departed from the statute as to be invalid.

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1935, 49 Stat. 1014:

SEC. 105. CAPITAL-STOCK TAX.

(a) For each year ending June 30, beginning with the year ending June 30,

---

the printer, and the record references herein, unless otherwise indicated, are to the manuscript record furnished to the printer.

[2] The provisions of the subsequent capital-stock tax statutes are, insofar as relevant, the same as Section 105, *supra*. Section 401 of the Revenue Act of 1936, 49 Stat. 1648; Section 1200 of the Internal Revenue Code (U. S. C., Supp. V, Title 26, 1200).

1936, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1.40 for each $1,000 of the adjusted declared value of its capital stock. * * *

Treasury Regulations 64 (1936 Edition):[3]

ART. 41. *Nature and Rate of Tax.*—The tax is an excise tax imposed with respect to carrying on or doing business during a taxable year ending June 30, or any fractional part thereof. It is an excise tax upon the exercise of the privilege of doing business and not on the business itself * * *.

ART. 42. *Doing Business.*—The term "business" is very comprehensive and embraces whatever occupies the time, attention, or labor of men for profit. Accordingly, regardless of the nature of its activities, any corporation organized for profit and carrying out the purpose of its organization is doing business within the meaning of the Act. Similarly, even if not organized for profit, any corporation which nevertheless engages in activities ordinarily carried on for profit is also doing business. It is immaterial whether the activities result in a profit or a loss, whether the corporation has been successful in its enterprise, or that because of unfavorable business conditions, no operations are carried on for a particular period. No particular amount of business need be done, nor is it necessary that the

[3] Substantially to the same effect are the like-numbered provisions in the 1938 edition of Regulations 64.

business be continuous throughout the taxable year.

* * * * *

ART. 43. *Illustrations.*—(a) General.—In general "doing business" includes any activities of a corporation whether it engages in —

* * * * *

(5) the orderly liquidation of property by negotiating sales from time to time as opportunity and judgment dictate and distributing the proceeds as liquidation is effected—for example, the liquidation of an estate, or of properties taken over from another corporation, or of the shareholders' fractional interests in particular property; * * *

STATEMENT

This case involves capital stock taxes for the years ending June 30, 1936, through 1939.

The taxpayer corporation was organized under the laws of Maryland for the purpose of acquiring and liquidating certain real and personal property formerly owned by the Washington, Baltimore & Annapolis Electric Railroad Company. It was incorporated with broad charter powers, including the power to buy, sell, develop, and otherwise deal in land; to loan money, conduct a general brokerage business, deal in personal property, acquire other corporations, borrow money, issue bonds, buy stock, and carry on any general business authorized under the Maryland laws. Shortly after its incorporation, on September 30, 1935, taxpayer

received the properties from a bondholders' protective committee, which had acquired them at the foreclosure sale of the railroad company. In return the bondholders received one share of taxpayer's stock for each $1,000 railroad-bond which they held (R. 2, 5–6).

The properties transferred to taxpayer consisted of certain rights-of-way, easements, terminal properties, and other real estate located in Baltimore, Annapolis, and Washington, ~~and~~ as well as at other points along the line of the railroad. Included among the assets received was the entire stock of a realty holding company, which in turn owned another realty company, both of which were subsidiaries of the railroad company and performed no function other than that of holding legal title to some of its real estate (R. 6).

The activities of the taxpayer ever since its incorporation have consisted of owning the above properties and selling them from time to time, making rentals under short-term leases, paying taxes, insurance premiums, and other expenses, paying the salaries of its three officers, which were nominal except on one or two occasions when additional compensation in the nature of bonuses was paid in connection with extensive sales, and paying attorneys' fees and dividends. The minutes of taxpayer's board of directors (Original Transcript of Record, pp. 6–122) disclose continuous activity during the years in controversy involving numerous negotiations for the sale of various items of property and equipment as well as negotiations for

various short-term leases. From December 31, 1935, through December 31, 1939, liquidation of taxpayer's assets had been partially accomplished. During that period the amount of real estate carried on its balance sheet has been reduced from $419,250 to $122,007.61 (R. 6–7).

Taxpayer's source of income has been from the properties held by it for liquidation. Approximately four-fifths of such income has been realized from the sales of real estate, and the remainder from the rental of properties under short-term leases. The properties belonging to the subsidiary companies were also embraced in the taxpayer's liquidation activities, and the proceeds from their disposition were distributed to the parent company as dividends. All net receipts except for contingencies were distributed to stockholders. The total amount of the dividends paid equalled $75 per share of stock, and the book value as of December 31, 1939, was $20.68 per share (R. 6–7).

For the years ending June 30, 1936, through 1939 taxpayer has paid capital stock taxes of $7,000, $5,985, $3,000, and $3,005, respectively. It brought suit for refund in the District Court which decided in its favor and the Circuit Court of Appeals affirmed (R. 5, 22).

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding and deciding that taxpayer was not carrying on or doing business within the meaning of the applicable statutory provisions.

2. The Circuit Court of Appeals erred in failing to give effect to the applicable Treasury Regulations.

3. The Circuit Court of Appeals erred in affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The question whether specified corporate activities are sufficient to constitute "business" within the meaning of the capital stock tax provisions usually calls for the application of established principles to the facts under review, and generally does not warrant certiorari. See Government's brief in opposition in *Hercules Mining Co.* v. *United States*, No. 522, present Term. Here, however, there is involved much more than the application of the statute to a specific set of facts. This case involves the validity of a Treasury Regulation of long standing which has undertaken to implement the statute by spelling out certain *types* of activities as falling within the statute. Article 43 (a) of Regulations 64 (1936 Edition) provides as follows:

> ART. 43. *Illustrations.*—(a) General.—In general "doing business" includes any activities of a corporation whether it engaged in—
>
> * * * * *
>
> (5) the orderly liquidation of property by negotiating sales from time to time as opportunity and judgment dictate and dis-

tributing the proceeds as liquidation is effected—for example, the liquidation of an estate, or of properties taken over from another corporation, or of the shareholders' fractional interests in particular property; * * *

These provisions have appeared in substance in the various editions of the applicable regulations ever since the Revenue Act of 1918.[1]

The decision of the court below holding these regulations invalid at this late date raises an important question in the administration of the revenue laws that should be reviewed by this Court. The Bureau of Internal Revenue advises that the instant question is raised in about 100 cases pending in the Bureau. Moreover, it would be difficult to foretell how many claims for refund of taxes already paid will be filed on the basis of this decision or to determine how much revenue for future years will be put in jeopardy as a consequence of the ruling below.

---

[1] The capital stock tax first appeared in the Revenue Act of 1916, 39 Stat. 756, Sec. 40, and the pertinent portions of the regulations have remained unchanged for about twenty-two years. Treasury Regulations 50, Article 18 (1919 Edition); Treasury Regulations 50, Article 11 (1920 Edition); Treasury Regulations 64, Article 12 (1922 Edition); Treasury Regulations 64, Article 12 (1924 Edition); Treasury Regulations 64, Article 22 (1933 Edition); Treasury Regulations 64, Article 33 (1934 Edition); Treasury Regulations 64, Article 43 (1936 Edition); Treasury Regulations 64, Article 43 (1938 Edition).

2. To the extent that it is possible to allege a conflict of decisions in cases of this type based upon the corporate activities themselves, we believe that the decision below is in conflict with *Edgar Estates Corp.* v. *United States*, 65 C. Cls. 415. In that case the corporation was organized for the purpose of acquiring and holding all the real and personal property devised and bequeathed to the residuary legatees under the will of a decedent. The company was to sell, mortgage, and otherwise dispose of the estate upon such terms as might seem proper to the board of directors, and to distribute the proceeds among the stockholders after payment of expenses. It was organized in 1917 and continued in existence until April 1933. During this period eight separate parcels of real estate were under its control. Repairs were made, rents collected, and the property was operated in such a way as to obtain for it the most advantageous price. When sales were made the cash received was immediately distributed to the stockholders. The corporation was under the exclusive management of one man, and its overhead expense was nominal. The court found that the company was engaged in doing business and said (p. 422)—

> The corporation came into existence, manifestly, because it enabled the stockholders * * * to conserve an estate of considerable proportions, curtail expenses, and provide for expeditious management and disposition in a way and by a method supe-

> rior to the established laws of the State respecting the administration of deceased persons' estates and the sale and division of realty owned by tenants in common.. * * * Rents were to be collected, some funds of the corporation were invested, and while the detail of activities resembles a process of liquidation, it is to be remembered that that is precisely the purpose of the incorporation, its one object to the discharge of which all business activities were solely directed. * * *

Factually, the only apparent distinction between the two cases is that in 1920 Edgar Estates Corporation bought three blocks of high-grade bonds (U. S. Victory Bonds and two industrials) at 97 or better, and sold them all within a year at a slight premium; it seems clear that there was no trading in securities for a speculative rise. Otherwise the activity of the company is actually greater in the case at bar.[5]

CONCLUSION

Therefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Acting Solicitor General.

SEPTEMBER 1941.

---

[5] Cf. *Johnson's Estate* v. *United States*, 37 F. Supp. 617, 624 (C. Cls.), in which the court distinguished the *Edgar Estates Corporation* case.

U. S. GOVERNMENT PRINTING OFFICE: 1941